No. 75-777

Supreme Court, U. S.
FILED
MAY 10 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals *en banc* (Pet. App. 1a–136a) is reported at 521 F.2d 885. The decision and order of the National Labor Relations Board (Pet. App. 139a–172a) is reported at 204 NLRB 760.

JURISDICTION

The judgment of the court of appeals (Pet. App. 137a–138a) was entered on July 1, 1975. On September 18, 1975, Mr. Justice Brennan extended the time in which to file a petition for a writ of certiorari to and including November 28, 1975. The petition was filed on that date and was granted on February 23, 1976. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a union engages in an unlawful secondary boycott within the meaning of Section 8(b)(4)(B) of the National Labor Relations Act when it causes, and threatens to cause, employees of a firm with which the union has a collective bargaining agreement containing a "work preservation" clause to refuse to handle prefabricated goods that their employer's contract with a general contractor obliges the employer to install.

STATUTE INVOLVED

Section 8(b) of the National Labor Relations Act, 61 Stat. 141, as amended, 29 U.S.C. 158(b), provides in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents——
>
> * * * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is——
>
> * * * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;
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> * * * * *

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

The Austin Company, Inc. (Austin), was the engineer that prepared the specifications for construction of the Norwegian Christian Home for the Aged

in Brooklyn, New York (the Home) (Pet. App. 139a–140a). The specifications called for the use of climate control units manufactured by Slant/Fin Corporation. Slant/Fin was to cut, thread, and install at the factory the internal piping on these units, which carried a one-year warranty contingent on factory fabrication of the internal piping (*id.* at 140a, 157a; A. 54–57, 77). Austin, acting as the general contractor for the project, awarded a subcontract for plumbing work to Hudik-Ross Company, Inc. (Hudik). This subcontract, which was awarded by competitive bidding, called for Hudik to perform the heating, ventilating and air conditioning work for the Home—including, as Hudik knew, installation of the Slant/Fin units (Pet. App. 140a, 148a).

Hudik had a collective bargaining agreement with Local 638 of the Plumbers and Steamfitters (the Union). Rule IX of this agreement provided that Hudik's steamfitter employees would cut and thread certain piping by hand on the jobsite. Shortly after the Slant/Fin units, which had been purchased by Austin, arrived on the jobsite, the Union's business agent told Austin's project superintendent that the Union's members would not install the units "because the piping inside the units was steamfitters' work" (Pet. App. 150a; see also *id.* at 140a–141a) and that Rule IX of their contract with Hudik called for them to do the inside piping work on the site. The business agent told Hudik the same thing, and Hudik's employees did not install the units (*id.* at 150a–151a).

Austin filed unfair labor practice charges with the Board (*id.* at 143a).[1]

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board concluded that the Union's refusal to install the Slant/Fin units was a secondary boycott, in violation of Section 8(b)(4)(B) of the National Labor Relations Act (the Act), 61 Stat. 141, as amended, 29 U.S.C. 158(b)(4)(B).[2] The Board stated (Pet. App. 141a–142a, 171a):

> We note that [the] refusal of the [Union] to let Hudik's employees install the climate control units was based on a valid work preservation clause in the agreement with Hudik, the subcontractor, and was for the purpose of preserving work they had traditionally performed. However, Hudik was incapable of assigning its employees this work; such work was never Hudik's to assign in the first place. Moreover, we note that the [Union] informed Austin, who did not employ employees represented by the [Union] and had no agreement with that Union, that it would not let Hudik install the climate control units involved. Con-

[1] The Board sought and obtained an injunction under Section 10(*l*) of the Act, 29 U.S.C. 160(*l*), requiring the Union to desist from its boycott of the Slant/Fin units. In response to the injunction Hudik's employees installed the units.

[2] The Board followed its earlier decision in *Local Union No. 438, United Association (George Koch Sons, Inc.)*, 201 NLRB 59 (1973), enforced *sub nom. George Koch Sons, Inc.* v. *National Labor Relations Board*, 490 F.2d 323 (C.A. 4), which involved a similar situation.

> sidered together these facts clearly indicate that the [Union] was exerting prohibited pressure on Hudik with an object of either forcing a change in Austin's manner of doing business or forcing Hudik to terminate its subcontract with Austin. Since the pressure exerted by the [Union] on Hudik was undertaken for its effect on other employers, this pressure was secondary and prohibited by Section 8(b)(4)(B). [Footnote omitted.]

The Board ordered the Union to cease engaging in such unlawful conduct (*id.* at 165a–167a).

C. THE COURT OF APPEALS' DECISION

The court of appeals, sitting *en banc* and dividing five to four, remanded the case to the Board. The court, reaffirming two prior panel decisions,[3] held that the Board's reliance upon Hudik's lack of power to assign the disputed work to its employees as the decisive factor was contrary to the principles enunciated in *National Woodwork Manufacturers Association* v. *National Labor Relations Board,* 386 U.S. 612.

The court observed that *National Woodwork* had held that the determination whether a work preservation clause and its enforcement violate Section 8(b)(4)(B) requires (Pet. App. 14a):

> an "inquiry into whether, under *all the surrounding circumstances,* the Union's objective was preservation of work for [the struck employer's] employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere. * * * *The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting* [*struck*] *employer vis-a-vis his own employees.*" [Emphasis, quote and brackets added by court of appeals; quoting from 386 U.S. at 644–645.]

This passage from *National Woodwork* persuaded the court of appeals' majority that the Union's activity here was primary. Since Hudik had executed a contract with the Union requiring it to preserve internal piping work for its employees, the court of appeals held that it could not "be considered a neutral bystander" when its employees struck to force it to honor that commitment (Pet. App. 40a).[4]

[3] *Local 742, Carpenters* v. *National Labor Relations Board,* 444 F.2d 895, certiorari denied *sub nom. J. L. Simmons Co.* v. *Local 742, Carpenters,* 404 U.S. 986; *Local 636, Plumbers* v. *National Labor Relations Board,* 430 F.2d 906.

[4] The court remanded the case to the Board, holding that the Board would be free to reconsider (1) whether the work preservation clause in Hudik's contract, viewed in the light of the custom and tradition of the industry, was intended to cover the work here at issue (Pet. App. 20a–24a, n. 25); (2) whether Hudik "knowingly entered" into the subcontract "in contravention" of its preexisting bargaining agreement (*ibid.*); and (3) whether the Union was in fact trying to organize Slant/Fin's employees (*id.* at 44a, n. 46). The court added that the Board also could consider Hudik's lack of control over assignment of the work as one factor in determining the Union's objective, but not "to the total exclusion of the circumstances which the *National Woodwork* Court stated might be relevant to the inquiry into the union's objective" (*id.* at 44a).

We agree with respondent (Br. in Opp. 4) that such a remand would serve no useful purpose. As respondent points out (Br. in Opp. 3), the language of the work preservation clause is broad enough to cover the work in dispute, all parties before the Board so assumed, and the Board so assumed (Pet. App. 141a) in arriving

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The dissenting judges concluded that the Board had considered all of the relevant circumstances, and that those circumstances fully supported the Board's conclusion that the Union was pursuing an illegal secondary objective. They argued (Pet. App. 113a–115a; footnotes omitted):

> The majority rejects as inherently sophistical the notion that * * * employers [such as Hudik] can ever be termed neutral: in their eyes Hudik * * * has actively violated an understanding for which the Union bargained collectively, and the Union's dispute is clearly with Hudik. But the Labor Board takes a more refined and realistic view of the situation. The Board insists that the Union's true complaint is with the predilection of architects, engineers and general contractors for factory-designed and -assembled goods. The Board * * * simply

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(Continued)
at its decision. The Administrative Law Judge expressed the opinion (Pet. App. 155a) that "the instant contract between Hudik and the Union, in providing that pipe would be cut and threaded on the job, necessarily implied that it referred to pipe within Hudik's control and which could be cut on the job." However, his ensuing analysis (Pet. App. 155a–164a) shows that this view was "not a major basis of [his] decision" (Pet. App. 155a). Moreover, the Board's decision (Pet. App. 140a–142a) reflects an assumption that the work preservation clause covered the disputed work. See also the opinion of the court of appeals (Pet. App. 6a).

As to the remainder of the remanded issues, the Administrative Law Judge, in findings that the Board adopted (Pet. App. 139a), concluded that Hudik was aware of the Austin specifications prior to making its bid and at the time it executed the subcontract (Pet. App. 148a and n. 3), and that there is no evidence that the Union was trying to organize Slant/Fin's employees (Pet. App. 152a).

> recognizes as one factor influencing its decision that the policy of using prefabricated goods, and the power to compel their use, belong to the general contractor and not to the subcontractor. Thus, the Union's dispute cannot logically be solely with the subcontractor, but must instead be also with the party who dictates that prefabricated products shall be employed: the owner, the designer, the general contractor.

SUMMARY OF ARGUMENT

This Court has made it clear that Section 8(b)(4)(B) of the National Labor Relations Act is designed to foster "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 692. In *National Woodwork Manufacturers Association* v. *National Labor Relations Board*, 386 U.S. 612, the Court held that, in making this accommodation in a situation where the union exerts strike pressure against an employer assertedly for the purpose of preserving work for the employer's employees, the relevant inquiry is whether, "under all the surrounding circumstances, the Union's objective was preservation of work for [the struck employer's] employees, or whether [its actions] were tactically calculated to satisfy union objectives elsewhere" (*id.* at 644).

The facts in *National Woodwork* supported the Board's conclusion that the union's object was primary when it refused to permit its members (employed by Frouge, a general contractor) to install prefabricated doors. Finishing doors was work that Frouge's employees traditionally had performed on the jobsite. And the collective bargaining agreement between Frouge and the union provided that Frouge's employees would not be required to handle doors that had been finished off the jobsite. The strike occurred when Frouge nevertheless ordered such doors, although it was not required to do so by its contract with the project owner.

The Board has reached a contrary conclusion in this case, and the difference in result is supported by critical differences of fact. Frouge was free to decide whether or not to use prefabricated doors. But here Austin, the project engineer, required the installation of prefabricated climate control units. The Union placed pressure not on Austin (whose employees it did not represent) but on Hudik, thus seeking work that Hudik never possessed or had a right to obtain. In these circumstances, the Board appropriately applied its "right to control" test. *Ohio Valley Carpenters District Council* v. *National Labor Relations Board,* 339 F.2d 142, 145 (C.A. 6).

Confronted by the demands of its employees, Hudik had available only two courses of action: it could have induced Austin to change its requirements and specifications for the job or, failing that, it

could have terminated its contract with Austin. The second course (like a refusal to bid on the job initially) would not have preserved or produced work for Hudik's employees. The first course could have produced work for Hudik's employees only if Austin could have been induced to buy units that did not have prefabricated internal piping. Hence, as the dissenting opinion in the court of appeals observed (Pet. App. 83a), "the pressure created by the Hudik employees' boycott of the Slant/Fin units must have been directed at Austin and Slant/Fin as they were the only parties with the power to satisfy the demand that the work be taken from Slant/Fin employees and reassigned to the Union."

This analysis is consistent with the principles enunciated in *National Woodwork.* In that case the union could have accomplished its design by changing the decision of Frouge alone. In the present case the Union's efforts could not have succeeded without changing Austin's decision as well as Hudik's. It was proper, therefore, for the Board to conclude that, while the object of the union pressure on Frouge was solely work preservation, at least *an* object of the pressure on Hudik was "to satisfy union objectives elsewhere." *National Woodwork, supra,* 386 U.S. at 644.

The situation here has important features in common with *Denver, supra,* and *National Labor Relations Board* v. *Local 825, Operating Engineers,* 400

U.S. 297. In those cases the union pressure was found to be secondary because it was exerted against an entity that lacked power to grant the union's ultimate demand and could aid the union only be ceasing to do business with, or forcing a change in the policies of, a third party. The principle is the same, and the result should be the same, whether the general contractor or the subcontractor is involved. It is unimportant that the Union may have had a dispute with Hudik over the working conditions of its employees. The fact remains that the dispute was created by Austin's decision and that Hudik was powerless to resolve it; the Union's pressure on Hudik therefore must have included at least one secondary objective—to change Austin's decision to specify Slant/Fin units.

It is true, of course, that Hudik's agreement with the Union contained a "work preservation clause" that arguably enlists Hudik as the Union's willing agent in obtaining the disputed work for the Union. But the parties cannot by contract convert into lawful primary activity that which the statute makes secondary. *Local 1976, Carpenters* v. *National Labor Relations Board,* 357 U.S. 93, 104–105. The Union's pressure, an object of which was to affect Austin's decision (or, at a minimum, Hudik's business relationship with Austin), does not become primary merely because Hudik may have promised to help the Union pursue this secondary object.

ARGUMENT

A UNION ENGAGES IN A SECONDARY BOYCOTT VIOLATING THE NATIONAL LABOR RELATIONS ACT WHEN IT EXERTS STRIKE PRESSURE AGAINST AN EMPLOYER TO OBTAIN WORK THAT THE EMPLOYER NEITHER POSSESSED NOR HAD A RIGHT TO OBTAIN

A. THE NATIONAL LABOR RELATIONS ACT FORBIDS UNION PRESSURE UPON AN EMPLOYER IF THE UNION HAS A "SECONDARY" OBJECTIVE

This Court has made it clear that Section 8(b)(4)(B) of the National Labor Relations Act is designed to foster "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 692; *National Woodwork Manufacturers Association* v. *National Labor Relations Board,* 386 U.S. 612, 626–627. The task of achieving these dual objectives is fraught with difficulties, not the least of which is the fact that the distinction between legitimate "primary" activity and illegal "secondary" activity is rarely "a glaringly bright line." *Local 761, Electrical Workers* v. *National Labor Relations Board,* 366 U.S. 667, 673.

Union activity is secondary if an object of the activity is to force a cessation of, or change in, business relations between two entities. *Denver, supra,* 341 U.S. at 688; *National Labor Relations Board* v.

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Local 825, Operating Engineers, 400 U.S. 297, 305. On the other hand, the objectives of even primary activity "include a desire to influence others" to withhold "their services or trade" (*Electrical Workers, supra,* 366 U.S. at 673) from the employer against whom such activity is directed. And some union activity will have both a primary object and a secondary object. In that event the activity is unlawful, for Section 8(b)(4) proscribes activity if "an" object is secondary,[5] a principle the court of appeals recognized (Pet. App. 41a).

The task of drawing the line between primary and secondary activity is particularly difficult where, as here, economic pressure is exerted at a construction project where a number of independent firms are working together.[6] The use of a prefabricated product may diminish or extinguish the need for work that employees of one of the firms have traditionally performed on the jobsite. The effect on the employees may be as great as if their employer had contracted out the disputed work. Cf. *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 379 U.S. 203. On the other hand, the decision whether to use a particular product may lie not with the employees' employer, but with third parties over which it has no control.

[5] See also *Denver, supra,* 341 U.S. at 689.

[6] The fact that the contractors are engaged on the same project and that the general contractor may have some supervision over their work does not "eliminate the status of each as an independent contractor or make the employees of one the employees of the other." *Denver, supra,* 341 U.S. at 689–690.

Deciding whether a dispute is primary or secondary usually requires an accommodation of these competing principles. When the Board confronted this problem in a work preservation dispute, it concluded that the language of Section 8(b)(4) could not be taken at its broadest literal sweep, and that a union, attempting to preserve for its members work they had traditionaly performed, could strike in an attempt to influence the employer's decisions. Such a strike might have an object of "forcing [the employer] * * * to cease using [or] handling * * * the products of" another firm, but it was "primary" activity not forbidden by the Act. *Milk Wagon Drivers Union, Local No. 603 (Drive-Thru Dairy),* 145 NLRB 445, 449. See also *Retail Clerks Union, Local No. 170* v. *National Labor Relations Board,* 296 F.2d 368, 373–374 (C.A.D.C.).

The Board concluded that the case would be different if the employer against which the union's pressure was exerted lacked the power to comply with the union's demands. *Clifton Deangulo and Local Union No. 98, Sheet Metal Workers (York Co.),* 121 NLRB 676, 685–686. Under the Board's test, "if a union demands that a contractor do something he is powerless to do except by ceasing to do business with somebody not involved in the dispute, it is manifest that an object of the Union is to induce this cessation of business"; it is "reasonable to hold that the object of the union was not an impossible act but was the alternative possible." *Ohio Valley Carpenters District Council* v. *National Labor Relations Board,*

339 F. 2d 142, 145 (C.A. 6). The Board also concluded that the presumption that the union's pressure in such circumstances is secondary can be rebutted. The dispute would be primary, for example, if the struck employer itself instigated its loss of power over the work in dispute.[7]

The Board's approach initially found widespread acceptance in the courts of appeals. Every court of appeals that considered the question held that the Board properly characterized as presumptively secondary pressure directed against an employer that lacked the power to provide its employees with the work they sought.[8] The test was forecast in the House Report on the 1947 amendments to the Act; the report indicates that it was the intention of Congress to proscribe boy-

[7] *Pipe Fitters, Local No. 120 (The Spohn Corp.)*, 168 NLRB 991, 992 (1967); *Painters District Council No. 20 (Uni-Coat Spray Painting, Inc.)*, 185 NLRB 930, 932 (1970). See also Pet. App. 110a–111a. The court of appeals expressly disapproved the use of the right to control even as a *prima facie* test. See Pet. App. 7a–12a, n. 9, 16a–17a. See also *Local 742, Carpenters* v. *National Labor Relations Board*, C.A.D.C., No. 73–1120, decided March 4, 1976, slip op. 15.

[8] See *Local 636, United Association* v. *National Labor Relations Board*, 278 F.2d 858, 864 (C.A.D.C.); *Local 5, United Association* v. *National Labor Relations Board*, 321 F.2d 366, 369 (C.A.D.C.), certiorari denied, 375 U.S. 921; *National Labor Relations Board* v. *Enterprise Association, Local 638, United Association*, 285 F.2d 642, 645 (C.A. 2); *National Labor Relations Board* v. *I.L.A., Local 1694*, 331 F.2d 712, 716–717 (C.A. 3); *Ohio Valley Carpenters District Council* v. *National Labor Relations Board*, 339 F.2d 142, 145 (C.A. 6); *National Woodwork Manufacturers Association* v. *National Labor Relations Board*, 354 F.2d 594, 597 (C.A. 7), reversed in part on other grounds, 386 U.S. 612. See also *American Boiler Manufacturers Association* v. *National Labor Relations Board*, 366 F.2d 815, 822 (C.A. 8).

cotts where "the employers are powerless to comply with demands giving rise to the [boycotting] activities * * *." H.R. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947), 1 Legislative History of the Labor Management Relations Act, 1947, p. 314 (1958).[9]

B. *NATIONAL WOODWORK* INDICATES THAT "WORK PRESERVATION" DISPUTES CAN BE EITHER PRIMARY OR SECONDARY, DEPENDING UPON THE CIRCUMSTANCES

In *National Woodwork* this Court reviewed part of the Board's interpretation of Section 8(b)(4). It approved the Board's view. It is ironic that the court of appeals now has held that the Court's approval in *National Woodwork* of part of the Board's accommodation of the competing principles spelled the doom of the rest of its policy.

The issue in *National Woodwork* was whether the union had engaged in an unlawful secondary boycott by refusing to permit its members, employed by Frouge, a general contractor, to install prefabricated doors. Finishing doors was work that Frouge's employees had traditionally performed on the jobsite. The collective bargaining agreement between Frouge and the union provided that its employees would not be required to handle doors that had been finished off the jobsite. The employees struck when Frouge nevertheless ordered such doors, although Frouge was not required to do so by its contract with the project owner.

[9] The remainder of the legislative history is inconclusive at best. The competing policy considerations that led to the adoption of Section 8(b)(4) have been fully canvassed in the three opinions in *National Woodwork* and in the dissenting opinion below (Pet. App. 88a–96a).

The Court stated that the determination whether the "will not handle" clause of the collective bargaining agreement, and its enforcement, were unlawful "cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's object was preservation of work for Frouge's employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere.[10] Were the latter the case, Frouge, the boycotting employer, would be a neutral bystander, and the agreement or boycott would * * * become secondary" (386 U.S. at 644–645, footnote omitted). Applying this test, the Court held that the objective of the "will not handle" clause "was preservation of work traditionally performed by the jobsite carpenters," making the clause itself a lawful work preservation agreement, and that the facts established[11] that the union's object in invoking that clause against Frouge was "*solely* [the] preservation of the traditional tasks of the jobsite carpenters" (*id* at 646; emphasis added).

The Court recognized that determining whether the union's objective was preservation of work for the employees of the struck employer, or the satisfaction of union objectives elsewhere, "will not always be a simple test to apply" (386 U.S. at 645). Indeed, Mr. Justice Harlan, whose vote was necessary to establish a majority of the Court for any disposition, concurred on the ground that the facts showed that "the contractual restrictive-product rule in question, and the boycott in support of its enforcement, had as their sole objective the protection of union members from a diminution of work" they "traditionally had performed * * * on the jobsite" (*id.* at 648). He observed that *National Woodwork* was "not a case of a union seeking to restrict * * * an employer with respect to the products he uses, for the purpose of acquiring for its members work that had not previously been theirs" (*ibid.*).

[10] The Court emphasized that there "need not be an actual dispute with the boycotted employer * * * for the activity to fall within this category" (386 U.S. at 645).

[11] The "Union refused to hang prefabricated doors whether or not they bore a union label, and even refused to install prefabricated doors manufactured off the jobsite by members of the Union" (386 U.S. at 646).

C. UNDER THE PRINCIPLES OF *NATIONAL WOODWORK* AND OTHER CASES THE UNION'S PRESSURE HERE HAD A SECONDARY OBJECTIVE

These principles support a different balance when the struck employer lacks the right to control the assignment of the disputed work. In contrast to Frouge, which was free to decide whether or not to use prefabricated doors, Hudik was obligated by its contract with Austin to install prefabricated climate control units. By demanding that Hudik's employees perform on the jobsite the internal piping work on climate control units, the Union was seeking work that Hudik never possessed and did not have

a right to obtain.[12] The Board, applying its "right to control" test, concluded that this circumstance made an important difference.[13]

Confronted by the demands of its employees, Hudik had available only two courses of action: it could have induced Austin to change its requirements and specifications for the job or, failing that, it could have terminated its contract with Austin.[14] The second

[12] Hudik's position was similar to that of the three contractors referred to in footnote 3 of the Court's opinion in *National Woodwork*, *supra*, 386 U.S. at 616, n. 3. These contractors, unlike Frouge, did not have "control" over the work which the union sought to preserve for its members. The court of appeals sustained the Board's finding that the union's pressure on them therefore was secondary and unlawful. 354 F.2d 594, 598–599 (C.A. 7). The union did not seek review of that ruling, and hence it was not before the Court in *National Woodwork*.

[13] The Board's position in this regard has been consistent since it decided *Deangulo*, *supra*. See, *e.g.*, *Local 5, United Association (Arthur Venneri Co.)*, 137 NLRB 828 (1962); *International Longshoremen's Association (The Board of Harbor Commissioners)*, 137 NLRB 1178 (1962); *Ohio Valley Carpenters District Council (Cardinal Industries, Inc.)*, 144 NLRB 91 (1963); *Metropolitan District Council of Philadelphia (Charles B. Mahin and National Woodwork Manufacturers Association)*, 149 NLRB 646, 658–659 (1964); *Local 636, United Association (Mechanical Contractors Association of Detroit)*, 177 NLRB 189 (1969); *Local Union No. 438, United Association (George Koch Sons, Inc.)*, 201 NLRB 59 (1973), enforced *sub nom. George Koch Sons, Inc.* v. *National Labor Relations Board*, 490 F.2d 323 (C.A. 4).

[14] The court of appeals speculated that Hudik could have attempted to settle the dispute by offering to compensate its employees for the lost work (Pet. App. 29a–31a). However, the Union never indicated that it would have been content if Hudik had paid its employees for the piping work on the Slant/Fin units. The Union's agent stated to both Austin and Hudik that the Union members simply would not install the Slant/Fin units (*id.* at 141a, 150a). It was therefore unnecessary for the Board to consider

course (like a refusal to bid on the job initially) would not have preserved or produced work for Hudik's employees; indeed, it not only would have deprived the employees of the job of connecting the Slant/Fin units but also would have deprived the employees of other piping work in the Home. The first course could have produced work for Hudik's employees only if Austin could have been induced to buy units that did not have prefabricated internal piping. Hence, as the dissenting opinion in the court of appeals observed (Pet. App. 83a), "the pressure created by the Hudik employees' boycott of the Slant/Fin units must have been directed at Austin and Slant/Fin as they were the only parties with the power to satisfy the demand that the work be taken from Slant/Fin employees and reassigned to the Union." Indeed, the fact that the Union agent went to Austin first (Pet. App. 141a, 150a–151a) confirms that the Union's principal concern was Austin's decision to purchase prefabricated units.

what effect, if any, a Union demand for compensation would have had upon its analysis. The problem is not presented by this case.

What is more, since Hudik's contract was for a fixed fee (A. 58), any payment of extra compensation would have been satisfied out of its pocket. Hudik would not likely have viewed such a demand as affording a practical alternative to the two courses suggested above. See *Local 742, Carpenters (J. L. Simmons Co.)*, 201 NLRB 70, enforcement denied *sub nom. Local 742, Carpenters* v. *National Labor Relations Board*, C.A.D.C., No. 73–1120, March 4, 1976. Too, any demand for extra compensation for work that Hudik never possessed and did not have a right to obtain, no less than a demand for such work itself, would demonstrate a union "object" beyond Hudik and reflect, at least in part, dissatisfaction with the decision of "the owner, the designer, the general contractor" (Pet. App. 115a) to use prefabricated goods. See also note 21, *infra*.

This analysis is entirely consistent with the principles enunciated in *National Woodwork.*[15] The circumstances of this case, taken together, demonstrate that, although the Union may have had a legitimate desire to preserve work for Hudik's employees, it knew that Hudik had no power to assign the disputed work to its employees. The Union necessarily intended to use Hudik as its cat's paw in order to place pressure upon those who had control over the work sought. Although primary activity lawfully may have the incidental effect of forcing a cessation of, or change in, business relations, the Board could reasonably conclude, as it did, that such a cessation or change, although "incidental" in *National Woodwork,* was "an" object of the Union here.[16]

A decision by Frouge not to buy prefabricated doors would have secured more work for its employees. But a cessation of business relations between Hudik and Austin would have produced no work on the Home for Hudik's employees; they could have obtained the work they sought only if they (with Hudik's aid) could have induced Austin to alter

[15] We submit, accordingly, that courts agreeing with the decision below are in error. See *National Labor Relations Board* v. *Local 164, Electrical Workers*, 388 F.2d 105, 109 (C.A. 3); *American Boiler Manufacturers Association* v. *National Labor Relations Board*, 404 F.2d 556, 561 (C.A. 8); *Beacon Castle Square Building Corp.* v. *National Labor Relations Board*, 406 F.2d 188, 192, n. 10 (C.A. 1) (dictum); *Western Monolithics Concrete Products, Inc.* v. *National Labor Relations Board*, 446 F.2d 522, 526 (C.A. 9).

[16] The Union's action was unlawful if *an object* of the action falls within the statutory proscription. See pages 13–14, *supra.*

Austin's specifications and its business relations with Slant/Fin. In short, in *National Woodwork* the union could accomplish its design by changing the decision of Frouge alone; in the present case the Union's efforts cannot succeed without changing Austin's decision as well as Hudik's. It was proper, therefore, for the Board to conclude that the Union's pressure on Hudik was not "related solely to preservation of the traditional tasks of the jobsite [steamfitters]," but was "tactically calculated to satisfy union objectives elsewhere." *National Woodwork, supra,* 386 U.S. at 644, 646.[17]

In *National Woodwork* the Court also emphasized that the boycott "was a shield carried solely to preserve the members' jobs," and that "Congress may have viewed the use of the boycott as a sword"—that is, "where the workers carry on a boycott to reach out to monopolize jobs or acquire new job tasks"—in a different light. 386 U.S. at 630–631. The Union in this case has brought pressure upon Hudik to cause it to

[17] Two courts of appeals have agreed with this analysis. *George Koch Sons, Inc.* v. *National Labor Relations Board*, 490 F.2d 323 (C.A. 4), enforcing 201 NLRB 59; *Associated General Contractors of California, Inc.* v. *National Labor Relations Board*, 514 F.2d 433, 437–438 (C.A. 9). But cf. the Ninth Circuit's decision in *Western Monolithics, supra.*

A recent commentary also endorses the Board's approach, although not all of its analysis. Leslie, *Right to Control: A Study in Secondary Boycotts and Labor Antitrust*, 89 Harv. L. Rev. 904 (1976). Professor Leslie's "cartel" analysis of the right to control cases is consistent with the findings of the Administrative Law Judge in this case. See Pet. App. 156a–164a. See also *id.* at 22a, n. 25.

"reach out" to acquire new work for its employees. As the dissenting opinion in the court of appeals pointed out (Pet. App. 85a, emphasis in original, footnote omitted):

> The Union is seeking what it asserts is *work preservation*, but the means it has chosen toward that end—a strike against an employer who never had the disputed work to assign—constitutes secondary pressure. * * * The only parties who could be said to have taken the work away from the local union are Slant/Fin, who manufactured the units complete with internal piping, and Austin, who specified the installation of such completed units. The strike insofar as it is against Hudik is not to achieve work *preservation* because the strike could not *preserve* work that Hudik never possessed and never had the power to assign.

The situation here is therefore similar to one in which a union invokes a work "preservation" agreement in an effort to acquire, for the employees covered by the agreement, work of a type different from that which they previously have performed. Such efforts, although concededly designed to affect the "labor relations of the contracting employer *vis-a-vis* his own employees" (*National Woodwork, supra,* 386 U.S. at 645), nonetheless quite properly have been held to be secondary and hence unlawful. See, *e.g., Associated General Contractors of California, Inc.* v. *National Labor Relations Board,* 514 F. 2d 433, 438 (C.A. 9); *Building Material, Teamsters Union Local No. 216* v. *National Labor Relations Board,* 520 F. 2d 172, 178–

179 (C.A.D.C.); *Local Union No. 98, Sheet Metal Workers* v. *National Labor Relations Board,* 433 F. 2d 1189, 1194–1195 (C.A.D.C.).[18]

The situation here also has features in common with *National Labor Relations Board* v. *Denver Building & Construction Trades Council, supra,* and with *National Labor Relations Board* v. *Local 825, Operating Engineers, supra.* The decision of the Board here is consistent with those decisions. In *Denver* the Union had a longstanding dispute with Gould & Preisner, an electrical subcontractor that employed non-union workers. Instead of confining its economic pressure to Gould & Preisner, which alone had power to employ union workers and thus to resolve the dispute, the union exerted pressure against Doose & Lintner, the general contractor. The Court rejected the union's con-

[18] The court of appeals expressed fear that the Board's "right to control" test would lead to the conclusion that there was no primary employer against which the union could exert economic pressure (Pet. App. 26a, n. 29; see also *id.* at 53a–56a (Bazelon, C. J., concurring)). But the Board found it unnecessary to decide whether "picketing or other actions brought to bear directly against Austin and Slant/Fin would constitute lawful primary activity" (Pet. App. 142a, n. 1) and this Court need not consider that problem. Compare *Bricklayers' Union, Local No. 8 (Western Monolithics Concrete Products, Inc.),* 180 NLRB 43, 46–47 (1969), set aside *sub nom. Western Monolithics Concrete Products, Inc.* v. *National Labor Relations Board,* 446 F.2d 522, 524–527 (C.A. 9), with *United Brotherhood of Carpenters, Local 112 (Summit Valley Industries, Inc.),* 217 NLRB No. 129 (1975), ALJ Dec., pp. 28–29, pending review *sub nom. Chamber of Commerce of the United States* v. *National Labor Relations Board,* C.A. 9, Nos. 75–2064, *et al.* And see *Connell Construction Co.* v. *Plumbers & Steamfitters Local No. 100,* 421 U.S. 616, 632–633.

tention that it was engaged in a primary dispute with Doose & Lintner alone because it sought simply to force the latter to make the job all-union. Sustaining the Board's finding that the pressure on Doose & Lintner was secondary and hence unlawful, the Court stated (341 U.S. at 688):

> If there had been no contract between Doose & Lintner and Gould & Preisner there might be substance in their contention that the dispute involved no boycott. * * * However, the existence of the Gould & Preisner subcontract presented a materially different situation. The non-union employees were employees of Gould & Preisner. The only way that respondents could attain their purpose was to force Gould & Preisner itself off the job. This, in turn, could be done only through Doose & Lintner's termination of Gould & Preisner's subcontract. The result is that the Council's strike, in order to attain its ultimate purpose, must have included among its objects that of forcing Doose & Lintner to terminate that subcontract.

Similarly, in *Operating Engineers* the union had a dispute with White, a construction subcontractor, because it employed ironworkers instead of engineers to operate a welding machine. Instead of confining its economic pressure to White, which alone had the right to employ engineers and thus to resolve the dispute, the union brought economic pressure to bear against, *inter alia,* Burns & Roe, the general contractor. The Court sustained the Board's conclusion that the pressure on Burns & Roe was secondary and hence

unlawful. The Court found that the clear implication of the union's action "was that Burns would be required either to force a change in White's policy or to terminate White's contract." 400 U.S. at 305.

In short, in both cases the union pressure was secondary because it was exerted against a firm that lacked power to grant the union's ultimate demand, and that could produce advantage for the union only by acting as the union's ally in bringing pressure upon a third party, by inducing a change in the business of that third party or by ceasing to do business with it. In those cases the union brought pressure on a general contractor, with an object of affecting the decisions of a subcontractor. Here the Union has brought pressure to bear upon a subcontractor, with an object of affecting its dealings with the general contractor and engineer. Surely this difference does not warrant a different conclusion. Nor is a different conclusion justified here because the Union may have had a dispute with Hudik over the working conditions of its employees. The fact remains that the dispute was created by Austin's decision and Hudik was powerless to resolve it; the Union's pressure on Hudik therefore must have included at least one secondary object—to change Austin's specification of Slant/Fin units.

D. THE UNION'S CONTRACT WITH HUDIK DOES NOT GIVE IT LICENSE TO ENGAGE IN UNLAWFUL SECONDARY PRESSURES

The court of appeals relied heavily upon the fact that the Union's contract with Hudik contained a

work preservation clause.[19] In the light of this clause, the court reasoned, the Union's strike simply was an attempt to compel Hudik to abide by its commitments, an object that the court thought was plainly primary.[20] See Pet. App. 6a, 8a, n. 9, 17a–25a, 29a–31a. The approach of the court of appeals in effect allows a Union and one employer to determine whether pressure is

[19] However, in *Local 742, Carpenters* v. *National Labor Relations Board*, 444 F. 2d 895 (C.A.D.C.), certiorari denied *sub nom. J. L. Simmons Co.* v. *Local 742, Carpenters*, 404 U.S. 986, on remand, 201 NLRB 70, enforcement denied *sub nom. Local 742, Carpenters* v. *National Labor Relations Board*, C.A.D.C., No. 73–1120, March 4, 1976, the court of appeals disapproved the Board's "right to control" test even in the absence of a work preservation clause. There was no contract at all between Local 742 and Simmons; the contract between Simmons and Local 742's parent (the United Brotherhood of Carpenters and Joiners) simply required Simmons to observe the working conditions and wages prevailing in the community where the work was to be performed. The court of appeals nevertheless found that the dispute was primary; it relied not on a work preservation *clause* but a work preservation *claim*, finding them to be equivalent. *Local 742, Carpenters*, read together with the instant case, indicates that in the view of the court of appeals union pressure is primary whenever it has a work preservation objective. Accordingly, Professor Leslie has stated that the court's reliance here on the contract clause between the Union and Hudik is "difficult to accept at face value." Leslie, *supra*, 89 Harv. L. Rev. at 907, n. 15.

[20] No charge was filed with the Board challenging the agreement under Section 8(e) of the Act, 29 U.S.C. 158(e), which makes it unlawful "to enter into" a secondary boycott agreement. Accordingly, the Board had no occasion to determine whether both the Union and Hudik contemplated, at the time the agreement was entered into, that it would apply to a situation where Hudik lacked control over the work. The Board assumed *arguendo* that the agreement was intended to apply even to that situation (see note 4, *supra*).

primary or secondary. But whether the Union's pressure on Hudik is primary or secondary depends on the criteria for differentiating the two types of activity, criteria that Congress has incorporated in the Act; the parties cannot by contract convert into primary activity that which the statute makes secondary. See *Local 1976, Carpenters* v. *National Labor Relations Board*, 357 U.S. 93, 105. If, as we have argued, the Union's pressure is secondary because directed against an employer that is able to "preserve" work for the Union's members only by inducing a third party (Austin) to cease doing business with a fourth party (Slant/Fin), the pressure does not become legitimate primary activity merely because the employer may promise, in an agreement with the Union, to cooperate in bringing pressure upon those parties that have the right to control the disputed work. An agreement that makes the employer the Union's willing ally instead of its unwilling agent in bringing pressure to bear on third parties can neither amend an Act of Congress nor change the character of the Union's object.[21] Cf. *Connell Construction Co.* v. *Plumbers &*

[21] Whether a work preservation agreement was intended to have a secondary objective is ordinarily determined by the parties' understanding as of the time the agreement was executed. See *Meat and Highway Drivers, Local Union No. 710* v. *National Labor Relations Board*, 335 F.2d 709, 716 (C.A.D.C.); *Sheet Metal Workers, Local Union No. 223* v. *National Labor Relations Board*, 498 F.2d 687, 693 (C.A.D.C.). If Hudik did not contemplate when the work preservation agreement was entered into that it would apply to a situation in which Hudik lacked control over the work, the agreement could not privilege the Union's use of economic

(Continued)

Steamfitters Local No. 100, 421 U.S. 616; *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797.

(Continued)

pressure to enforce it in that secondary situation. On the other hand, if the Union and Hudik contemplated that the agreement would apply even where Hudik lacked control over the work sought, the agreement to that extent would appear to be secondary and unlawful under Section 8(e), unless saved by the construction industry proviso to that Section. That proviso allows secondary agreements in the construction industry "relating to the contracting or subcontracting of work to be done at the site of the construction." See *Connell Construction Co,. supra*, 421 U.S. at 626–633; *United Association Pipe Fitters Local Union No. 455 (American Boiler Mfrs. Assn.)*, 154 NLRB 285, 288–289 (1965), enforced *sub nom. American Boiler Mfrs. Assn.* v. *National Labor Relations Board*, *supra*, 366 F.2d at 822–823, on remand *sub nom. United Association Pipe Fitters Local Union No. 455*, 167 NLRB 602, 603–604 (1967) (Hickey incident); *Drivers, Local Union No. 695* v. *National Labor Relations Board*, 361 F.2d 547, 552–553 (C.A.D.C.). However, an agreement protected by the proviso may be enforced only through a lawsuit or other similar means, and not through pressure that would constitute restraint and coercion within the meaning of Section 8(b)(4)(B). See H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39–40 (1959); *Orange Belt District Council* v. *National Labor Relations Board*, 328 F.2d 534, 537 (C.A.D.C.); *National Labor Relations Board* v. *International Brotherhood of Electrical Workers*, 405 F.2d 159, 162–164 (C.A. 9); *Sheet Metal Workers, Local Union No. 223 (Continental Air Filters Co.)*, 196 NLRB 55, 56 (1972), remanded on other grounds, 498 F.2d 687 (C.A.D.C.). Cf. *Southern California Pipe Trades District Council No. 16 (Associated General Contractors of California)*, 207 NLRB 698 (1973), reversed *sub nom. Associated General Contractors of California* v. *National Labor Relations Board*, *supra*, 514 F.2d at 438–439; *United Association Pipe Fitters Local Union No. 455 (American Boiler Mfrs. Assn.)*, *supra*, 154 NLRB at 291–292, on remand, 167 NLRB at 604 (Pierre Aircon incident), remanded on other ground *sub nom. American Boiler Mfrs. Assn.* v. *National Labor Relations Board*, 404 F.2d 547, 556 (C.A. 8), certiorari denied, 398 U.S. 960.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to that court with directions to enforce the Board's order.

Respectfully submited.

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MAY 1976.

U.S. GOVERNMENT PRINTING OFFICE: 1976